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No. 99-1957

IN THE

Supreme Court of the United States

HAVANA CLUB HOLDING, S.A. AND
HAVANA CLUB INTERNATIONAL, S.A.,
Petitioners,

v.

BACARDI & COMPANY LIMITED AND
BACARDI-MARTINI USA, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE EUROPEAN-AMERICAN BUSINESS COUNCIL IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE EUROPEAN-AMERICAN BUSINESS COUNCIL IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b), the Organization for International Investment ("OFII") and the European-American Business Council ("EABC") hereby move for leave to file the accompanying brief as *amici curiae* in support of the Petitioners, Havana Club Holding, S.A. and Havana Club International, S.A., seeking a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit. Petitioners

have consented to the filing of the brief, but respondents have declined to consent.

OFII is a trade association based in the United States whose members are domestic affiliates of companies that transact business around the globe. OFII members are owners and rights holders in intellectual property of all kinds throughout the world and count intellectual property among their most valuable assets. OFII has therefore been vigilant in supporting secure, predictable legal frameworks within which to protect and enforce trademarks, trade names, copyrights, and patents.

EABC is a business association active on transatlantic trade and policy issues, and is comprised of over 85 European Union and United States member companies. EABC's work includes providing a forum for dialogue on transatlantic issues; preventing EU/US disputes and roadblocks to desirable policy outcomes; shaping quality and workable issue strategies; serving as an authoritative voice for EU/US interests on transatlantic policy issues; and helping member companies achieve business objectives.

The *amici* are keenly interested in the issues presented by the Second Circuit's decision. That decision rests on misguided and novel notions of treaty abrogation, under which the stability afforded by settled principles of international and domestic law governing treaties is substantially undermined. Because it involves the scope of protections afforded to intellectual property, moreover, the Second Circuit's decision threatens to diminish valuable property rights that have long been protected on an international basis without regard to tensions or disputes between particular countries. The harm is multi-lateral: the decision not only threatens the domestic protection afforded to intellectual property originating abroad, but on a reciprocal basis weakens the protections afforded to U.S. companies doing business abroad.

The decision below, therefore, would have far-reaching and dramatic consequences for *amici* and their members if allowed to stand. *Amici* therefore seek leave to file the accompanying brief to add their voice and perspective to the petitioners' request that this Court grant review.

Respectfully submitted,

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BRIEF OF AMICI CURIAE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE EUROPEAN-AMERICAN BUSINESS COUNCIL IN SUPPORT OF PETITIONERS

The Organization for International Investment ("OFII") and the European-American Business Council ("EABC") submit this brief as *amici curiae* in support of the petition for writ of certiorari filed by Havana Club Holding, S.A. and Havana Club International, S.A. [1]

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[1] Pursuant to S. Ct. Rule 37.6, *amici curiae* state that no counsel for any party to this case authored this brief in whole or in part and that no person or entity, other than the *amici* and their members, made a monetary contribution to the preparation or submission of the brief.

STATEMENT OF INTEREST

OFII is a trade association based in the United States representing the interests of international companies operating in this country. Members of OFII are domestic affiliates of companies transacting business around the globe and employ hundreds of thousands of workers in plants and locations across the Nation.

OFII's mandate is to explain to policymakers, courts, and the public the positive economic contributions OFII members make to the U.S. economy and to ensure that international companies receive nondiscriminatory national treatment under federal and state law. For example, OFII has engaged in an ongoing effort to monitor and oppose unilateral sanctions proposals and has participated as *amicus curiae* in appeals involving such measures. *See, e.g.*, *Crosby* v. *National Foreign Trade Council*, 120 S. Ct. ___ (2000).

Of particular relevance to this case is the fact that OFII members are owners and rights holders in intellectual property of all kinds throughout the world and count intellectual property among their most valuable assets. Secure, predictable legal frameworks within which to protect and enforce trademarks, trade names, copyrights, and patents are therefore of critical importance to OFII members' day-to-day business operations. Accordingly, OFII is vigilant in representing its members' vital interests in judicial proceedings where those legal frameworks and the protection of intellectual property are at risk. This is just such a case.

Comprised of over 85 EU and US member companies, the EABC is the leading business association active on transatlantic trade and policy issues. The EABC is viewed as an authoritative, highly credible, and effective voice on transatlantic policy issues. EABC's work includes providing a forum for dialogue on transatlantic issues; preventing EU/US disputes and roadblocks to desirable policy outcomes; shaping quality and workable

issue strategies; serving as an authoritative voice for EU/US interests on transatlantic policy issues; and helping member companies achieve business objectives.

SUMMARY OF ARGUMENT

There is no dispute that the decision below fails to accord the protection to intellectual property which the United States agreed to provide when it entered into the General Inter-American Convention for Trade Mark and Commercial Protection in 1931. The Second Circuit, however, found that convention abrogated by virtue of the Cuban embargo, which is embodied in regulations adopted by the Executive in 1963. In reaching that conclusion, the Second Circuit's decision improperly permits administrative action to abrogate an international treaty, contrary to the longstanding requirement that abrogation of treaties—as much the "supreme Law of the Land" as any statute—must find its source in the action of Congress *and* the Executive. While the court of appeals did find support for its decision in several acts of Congress that post-dated the regulations, it neither relied on those statutes as the basis for abrogation nor honored the requirement that statutes should be read to avoid conflict with international obligations.

The Second Circuit's decision, therefore, is a dramatic departure from settled principles concerning the interplay between international obligations and domestic law. This Court's review is warranted, however, not only to consider the legal issues presented, but also in light of the broad-ranging practical effects of the Second Circuit's decision. Both domestic and foreign companies have long relied on the protections for intellectual property such as those at issue here. Those protections are seriously undermined by the decision below, and could well come unraveled if Cuba exercises its legal right, established as a result of the decision below, to decline to protect American marks, and if other countries follow suit in declining to afford American intel-

lectual property the reciprocal protections which have been in place for more than half a century.

The broader significance of this case is its effect on a wide variety of international obligations beyond the intellectual property context. *Amici* and their members rely on varied and far-reaching treaty obligations to ensure a non-discriminatory environment for business in the United States, and reciprocal benefits abroad. The decision of the Second Circuit, and the reasoning on which it is based, makes the entirety of this network less secure and less dependable—a result that is wholly avoidable under a correct understanding of the law. This Court's intervention is plainly warranted.

ARGUMENT

I. PROTECTION OF PETITIONERS' INTELLECTUAL PROPERTY RIGHTS IS PLAINLY ESTABLISHED BY TREATY

Congress has long made abundantly clear its intention to provide and secure international protection of intellectual property rights even in the face of strained—or hostile—international relations. Since at least the time it enacted the Trading With the Enemy Act ("TWEA"), 50 U.S.C. App. § 1, *et seq.*, in 1917, Congress has permitted nationals of foreign countries to enforce such rights on an equal basis without regard to the state of relations between the United States and the nationals' country of origin. Section 10 of TWEA accordingly provides that "[a]ny enemy, or ally of an enemy, may institute and prosecute suits * * * to enjoin infringement of letters patent, trade-mark, print, label, and copyrights in the United States owned or controlled by said enemy or ally of enemy, in the same manner and to the extent that he would be entitled so to do if the United States was not at war." 50 U.S.C. App. § 10(g).

This abiding conviction to protect intellectual property rights—and to secure a reciprocal benefit for American interests abroad—was reinforced in 1931, when the

Senate ratified the General Inter-American Convention for Trade Mark and Commercial Protection ("IAC"). Under the IAC, "[e]very mark duly registered or legally protected in one of the Contracting States"—including both the United States and Cuba—"shall be admitted to registration or deposit and legally protected in the other Contracting States, upon compliance with the formal provisions of the domestic law of such states." IAC, Article 3. (Pet. App. 95a-96a). As this Court explained in *Bacardi Corporation of America* v. *Domenech*, 311 U.S. 50, 163 (1940), "[t]he clear purpose of the treaty is to protect the foreign trade marks which fall within the treaty's purview. * * * If duly registered and protected in one of the Contracting States, the mark is to be admitted to registration or deposit and is to be legally protected in one of the other Contracting States."

The protection provided by the IAC is explicitly extended by the terms of that treaty to the transfer of duly registered marks. Under Article 11, the "transfer of the ownership of a registered or deposited mark" in the country of origin "shall be recognized in the other Contracting States" upon the proof that the transfer was proper under the internal law of the State in which the transfer occurred. Pet App. 100a.[2] As this Court recognized in *Bacardi*, 311 U.S. at 161, the IAC is a self-executing treaty: "This treaty on ratification became part of our law. No special legislation in the United States was necessary to make it effective."

In keeping with the express terms and intent of the IAC, both Cuba and the United States have long permitted marks originating in the other country to be registered and protected—despite the Cuban embargo in

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[2] As the District Court observed, "[i]n the spirit of according reciprocal rights between signatory nations, Article 11 binds the United States and other member nations to give effect to and record upon its registry a valid transfer of a trademark that has occurred in another member nation." Pet. App. 74a (footnote omitted).

existence for nearly four decades—as embodied in the Cuban Assets Control Regulations ("CACR"), 31 C.F.R. §§ 515.101-515.901 (1999).[3] While those regulations contain broad prohibitions that would otherwise ban assignments of Cuban trademarks and other transactions involving Cuban intellectual property rights, they also offer exceptions in the form of licenses that provide protection for intellectual property rights finding their origin in Cuban authority. As noted in the Petition, at 5, numerous American companies—including some of the household names of American commerce—have received protection from infringement in Cuba.

One Cuban company receiving protection in this country pursuant to the reciprocal benefits afforded by the IAC was Cubaexport, which registered its HAVANA CLUB trademark in Cuba in 1974 and in the United States in 1976; that mark had also been registered without challenge in more than 80 nations around the world. In 1994, Cubaexport granted worldwide rights to the mark to Cuban rum distributor Havana Rum & Liquors, S.A. ("HRL"). HRL had in 1993 entered into a joint venture with Pernod Ricard, S.A. to sell and promote HAVANA CLUB rum. The companies formed Havana Club Holding, S.A. ("HCH"), a Luxembourg corporation to which HRL assigned the HAVANA CLUB trademark and business, and Havana Club International, S.A. ("HCI"), a company organized under Cuban law that conducts the HAVANA CLUB business and uses the trademark and trade name under an exclusive license from HCH.

While these commercial arrangements appear complicated, certain critical facts are clear. In particular, it is undisputed that the "the 'Havana Club' mark registered in the United States was originally registered in Cuba and was transferred in accordance with Cuban law."

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[3] *See Regan* v. *Wald*, 468 U.S. 222, 225-230 (1984) (describing background of and authority for CACR).

Pet. App. 13a. It is also clear that, under the terms of Article 11 of the IAC, the transfer of the mark to petitioner HCH "will be recognized in the United States." *Id.* Such recognition includes the ability to enforce the mark in the courts of the United States.[4] This is not a case, therefore, that requires application of the "accepted canon" discussed in *Bacardi*, 311 U.S. at 163, under which "we should construe the treaty liberally to give effect to the purpose which animates it." *Id.* Here, the plain terms of the IAC protect the rights at issue, without need to resort to a liberal construction.

The courts below, however, refused to provide the promised protection, finding that the IAC had been abrogated by the Executive's adoption of the CACR. It is that conclusion, and the faulty analysis on which it lies, that requires this Court's review.

II. THIS COURT SHOULD REVIEW THE SECOND CIRCUIT'S MISGUIDED CONCLUSION THAT THE TREATY HAS BEEN ABROGATED BY ADMINISTRATIVE ACTION

1. Under Article VI of the Constitution, not only the Constitution itself and the laws adopted under it, but also "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const., art. VI, § 2, cl. 2. Case law credits the plain meaning of this language, recognizing that a treaty and a statute are on equal footing. *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("By

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[4] In the Lanham Act, Congress has expressly provided that the United States courts would be open to claims by foreign nationals with interests in trademarks or trade names protected by treaties such as the IAC. *See* 15 U.S.C. § 1126(b) ("Any person whose country of origin is a party to any convention or treaty relating to trademarks, trade or commercial names * * * to which the United States is also a party * * * shall be entitled to the benefits of this section under the conditions expressed herein to the extent necessary to give effect to any provision of such convention, treaty or reciprocal law.").

the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other."). *See also Chae Chan Ping* v. *United States*, 130 U.S. 581, 600 (1889) (self-executing treaty is "the equivalent of a legislative act"); *Edye* v. *Robertson* (*The Head Money Cases*), 112 U.S. 580, 598-599 (1884) ("A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.").

In its decision below, however, the Second Circuit elevated the status of administrative regulations—the CACR—and found in those regulations the abrogation of the IAC. In so doing, it "accord[ed] primacy" to what it interpreted as "the prohibition of the CACR that bars a Cuban national or entity from transferring a United States trademark." Pet. App. 14a. In this context, the court said it had "no doubt" that the restrictive interpretation of the regulations it recognized "will override any conflicting treaty protection." *Id.* at 15a.

While the court's opinion paid lip service to the requirement that *Congress* must clearly express its intent to abrogate a treaty (discussed below), and indicated that it had found such expressions of intent in statutes adopted well after the CACR, the Second Circuit was careful to point out that it was *not* applying those statutes (retroactively) to the trademark assignment at issue here. Instead, it identified the issue it was deciding as "[w]hether the CACR prohibit the assignments," *id.* at 10a, that were authorized by the IAC, and it found the IAC abrogated by crediting the interpretation of the CACR offered by the Treasury Department's Office of Foreign Assets Control ("OFAC"). *Id.* at 15a.

This Court should review the Second Circuit's surprising decision to permit administrative action to abrogate an international treaty obligation. As long ago

as *The Head Money Cases*, the Court made clear that the relative strength—or, as the Court put it, "sanctity," 112 U.S. at 599—of treaties and statutes was determined at least in part by reference to the process by which those sources of law were adopted: "A treaty is made by the President and the Senate. Statutes are made by the President, the Senate, and the House of Representatives. The addition of the later body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two." *Id.* Here, by contrast, the CACR were promulgated by the Executive alone, and the Second Circuit's decision purports to permit such an action to override international obligations embodied in a treaty "made by the President and the Senate." *Id.* This Court should review and reverse that conclusion to restore the constitutionally designed balance between the Executive and Legislative branches in this critical area.[5]

2. Certiorari is warranted for a second reason as well. When it did consider the statutes that Congress later passed concerning the Cuban embargo, the Second Circuit's decision—while disclaiming any direct reliance on those statutes—made little effort to interpret them to avoid a conflict with the IAC but instead simply assumed that it knew how Congress would want this case decided. Its decision therefore substituted little more than judicial hunches for the clear *congressional* statement that is ordinarily required for abrogation.

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[5] In adopting the CACR, the Executive relied on TWEA, which was adopted nearly half a century before promulgation of the CACR. The IAC, of course, was ratified in the intervening years, and in finding that treaty abrogated by the CACR, the Second Circuit did not rely on any intervening *congressional* action of the sort on which such abrogation is ordinarily based. Instead, the court relied solely on the *administrative* action in promulgating the CACR in 1963.

Given the equal footing of a treaty and a statute, this Court has long recognized that, where a conflict between the two exists, the authority adopted later in time will control. *See, e.g.*, *Whitney* v. *Robertson*, 124 U.S. at 194 ("if the two [a treaty and an act of legislation] are inconsistent, the one last in date will control the other"); *Chae Chan Ping*,130 U.S. at 600 ("the last expression of the sovereign will must control.").

It is also well settled, however, that "[a] treaty will not be deemed to have been abrogated or modified by a later statute *unless such purpose on the part of Congress has been clearly expressed*." *Cook* v. *United States*, 288 U.S. 102, 120 (1933) (emphasis added). *See also Chae Chan Ping*, 130 U.S. at 600 ("It will not be presumed that the legislative department of the government will lightly pass laws which are in conflict with the treaties of the country."). Accordingly, it has been established since the earliest days of this Court that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

In this case, the Second Circuit found the IAC abrogated by holding that two statutes adopted *after* the CACR and *after* the transfers at issue here—the Cuban Liberty and Democratic Solidarity Act, Pub L. No. 104-114, 110 Stat. 785 (1996), which codified the CACR, and section 211(b) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 221(b), 112 Stat 2681, 2681-88 (1998)—constituted evidence "of congressional purpose that the result we reach should prevail over any contrary arguments, including those based in the IAC." Pet. App. 16a. *See also id.* at 15a ("we have no doubt that Congress * * * expects that OFAC's restrictive interpretation [of the CACR provisions] will override any conflicting treaty protection").

By failing to find a clear statement of abrogation and instead relying on its own broad sense of what it believed Congress would want, the Second Circuit departed from the principles that apply to treaty abrogation. As explained in the petition, moreover, a careful analysis of the statutes to which the court of appeals alluded offers ready interpretations of those statutes under which they would *not* abrogate the IAC. *See* Pet. at 16-17 & n.9. Because the Second Circuit failed to heed the settled doctrine that "an act of congress ought never to be construed to violate the law of nations"—in this case, embodied in the IAC—"if any other possible construction remains," *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 118, this Court should review its decision and re-establish the critical obligation of the federal courts to *avoid* treaty abrogation unless plainly required by an act of Congress.

III. RESOLUTION OF THE QUESTIONS PRESENTED HAS RECURRING CONSEQUENCES FOR BOTH UNITED STATES AND FOREIGN COMMERCIAL INTERESTS

The issues presented by the Second Circuit's decision are of far broader importance than the particular dispute between the parties. The abrogation of a treaty has significant consequences for the United States, placing the Nation in violation of its legal obligations to other countries. While Congress is certainly entitled to conclude that such abrogation is necessary or desirable in a particular context, *courts* should be extremely reluctant to reach such a result where no clear congressional mandate exists. If the courts too readily find abrogation, the United States will soon be crippled in its ability to demand that other nations abide by their treaty obligations.

The adverse effects of the decision below will not only be visited on the Nation's interest as such, but will also be imposed on the commercial interests of United States' companies operating in other lands. Given the

reciprocal nature of many treaty obligations—including those at issue here—abrogation of those obligations by the United States will necessarily lead to reduced protection of American interests abroad. This effect will first be visited on American companies whose trademarks are recognized in Cuba itself, because the decision below frees Cuba from any legal obligation to abide by the terms of the IAC where American companies' interests are involved. *See Charlton* v. *Kelly*, 229 U.S. 447, 473 (1913); Restatement (Third) of the Foreign Relations Law of the United States ("Restatement") § 335(2)(b). Thus, Cuba may well decide to withdraw the protection it has long offered to trademarks such as "Calvin Klein," *see* Pet. at 13 n. 6, and permit sales of merchandise bearing that name—but wholly unauthorized by the originator of that name—to its citizens and to tourists of the world who regularly visit Cuba.

Other countries in which American trademarks have long been protected might also come to use the decision below as support for decisions to withdraw such protection. *See* Restatement § 335(2)(c). In short, while American companies have long relied on the terms of the IAC to afford protection of their intellectual property in other countries, that reliance is placed on an infirm foundation in light of the Second Circuit's holding that the United States has abrogated the IAC and need not afford similar protection here.[6]

In addition, the Second Circuit's decision directly affects the interests of companies which have relied on

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[6] Indeed, the effects of the decision below are already a matter of international controversy. On July 3, 2000, the European Union announced that it would seek a dispute settlement panel in the World Trade Organization over the use of the HAVANA CLUB trademark. The EU contends that the United States is in violation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights because, under the interpretation of Section 211 adopted by the Second Circuit, U.S. law discriminates against foreign companies.

the United States' longstanding assent to enforcement of intellectual property rights originating in other countries. Rights originating in Cuba are of course immediately called into question by the decision below, but the decision also undermines the reliability and stability of the legal frameworks for protection and enforcement of trademarks, trade names, copyrights, and patents, which are of critical importance to international commercial activity.

The deleterious effects of the decision below are not limited to the intellectual property context. *Amici* and their members rely on a broad network of treaty obligations—such as the treaties of friendship, commerce, and navigation, bilateral investment treaties, double taxation treaties, the NAFTA, and the WTO Agreement—to ensure a non-discriminatory environment for business in the United States, and reciprocal benefits abroad. It is no exaggeration to say that the decision of the Second Circuit, and the reasoning on which it is based, makes the entirety of this network less secure and less dependable than it was prior to that decision. This Court's intervention is plainly warranted.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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